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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, *et al.*,
Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

The Lawyers' Committee for Civil Rights Under Law and the N.A.A.C.P. Legal Defense and Educational Fund, Inc., respectfully submit this *amici* brief in support of the respondents, with the written consent of all parties. The parties' consents have been filed with the Clerk of the Court.

INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law was founded in 1963, at the request of the President of the United States, to help secure the civil rights of all

Americans through the prosecution of civil rights cases and by other means. Over the past 19 years, the Committee has enlisted the services of thousands of members of the private bar across the country in addressing the legal problems caused by discrimination and by poverty.

The NAACP Legal Defense and Educational Fund, Inc., is a nonprofit corporation whose principal purpose is to secure the civil and constitutional rights of minorities through litigation and education. For more than forty years, its attorneys have represented parties in thousands of civil rights cases, including many significant cases before this Court and the lower courts.

The Committee and the Fund have participated, either as counsel for a civil rights plaintiff or as *amicus*, in a number of decisions of this Court construing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* These include *Connecticut v. Teal*, —— U.S. ——, 73 L.Ed.2d 130 (1982); *General Telephone Co. of the Southwest v. Falcon*, —— U.S. ——, 72 L.Ed.2d 740 (1982); *County of Washington v. Gunther*, 452 U.S. 161 (1981); *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), and other cases.

SUMMARY OF ARGUMENT

I.

A. This case is squarely controlled by the decision in *Los Angeles Department of Water & Power v. Manhart*, which considered and rejected many of the arguments advanced by the petitioners and their *amici*. In *Manhart*,

the employer sought to justify a pension plan requiring higher contributions from women than from men for monthly benefits equal to those of male employees retiring at the same age; this Court rejected the contention that the plan did not violate Title VII of the 1964 Civil Rights Act because the value of the pensions and contributions were "actuarially equal." So, in this case, Title VII proscribes use of a plan based on equal contributions by men and women but affording smaller monthly benefits upon retirement to women.

Manhart also involved the employer's claim that unisex contributions and benefits would lead to adverse selection out of the pension scheme by males and the ultimate destruction of the plan. It is as clear in this case as it was in *Manhart* that there is no record evidence supporting this contention, and that adverse selection on the scale predicted by petitioners' *amici* is highly unlikely. Moreover, materials in this record and facts judicially noticeable demonstrate the extent to which the life annuity plans at issue were based upon the sex of employees, rather than upon an accurate measure of expected longevity.

Indeed, the sex-based tables at issue here do not even deal fairly with women as a class, compared with men as a class. By substantially overstating the average sexual differences in life expectancy at the relevant ages, they require women as a class to subsidize the benefits of men as a class.

B. The Arizona plan cannot be saved from condemnation under Title VII by the "open market" exception of *Manhart*. Arizona did far more than passively make available accumulated contributions to retiring employees who purchased their own life annuities on the open market; it affirmatively limited the choices available to its employees to include only life annuities based on discriminatory, sex-based mortality tables. Nor can it be said that Arizona gave its employees a selection of payout op-

tions, including life annuity plans, which fairly reflected the "open market." The State simply failed to establish on this record that it was unable to contract for unisex annuities, and *amici's* own research indicates that such plans are available and in use today. Moreover, the Lincoln National Life Insurance Company—one of the companies used in Arizona's plan—has informed *amici* that it is willing to provide group life annuities on a unisex basis to employers offering it a substantial amount of business.

II.

Because *Manhart* explicitly put employers on notice that sex-based pension plans violated Title VII, the considerations which led this Court to withhold retroactive monetary relief in that case are not present, and such relief was properly awarded below.

ARGUMENT

I. THE PRESENT CASE IS CONTROLLED BY THIS COURT'S DECISION IN *LOS ANGELES DEPARTMENT OF WATER & POWER v. MANHART*, FROM WHICH IT IS NEITHER FACTUALLY NOR LEGALLY DISTINGUISHABLE.

A. Most of the arguments made by petitioners and their *amici* were considered and rejected in *Manhart*, and no persuasive justification for abandoning that ruling is advanced in this case.

Despite the voluminous and repetitive briefs submitted by petitioners and *amici*, the present case cannot persuasively be distinguished from this Court's recent ruling in *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978). In that case the Court held that a municipal employer's mandatory pension plan which required higher pay-period contributions from female employees than from male employees, although paying equal monthly benefits upon retirement, constituted discrimination in compensation on the basis of sex which

violated Title VII of the 1964 Civil Rights Act. This conclusion followed, the Court's opinion states, despite the actuarial validity of the generalization that women employees, as a group, could be expected to draw monthly pension benefits for a longer period of time than male employees, as a group, if both retired at the same age.

1. *"Equal Actuarial Value".*

As if *Manhart* had never been decided, petitioners and their *amici* urge strenuously that Arizona's pension plan —which makes available to its male and female employees an annuity option requiring equal pay-period contributions but affording women retirees smaller monthly benefits than men who retire at the same age—is nondiscriminatory because the present actuarial value of the promise to pay an annuity is equal for men and women (based on the longer life expectancy of women as a group). Thus, if petitioners are correct, *Manhart*'s interpretation of Title VII as proscribing unequal contributions for equal monthly benefits based on sex does not reach a plan which requires equal contributions for unequal monthly benefits based on sex. Nothing in *Manhart* suggests that the Court's holding was so cramped.

Indeed, the "equal actuarial value" argument was advanced in *Manhart*:

> In essence, the Department is arguing that the prima facie showing of discrimination based on evidence of different contributions for the respective sexes is rebutted by its demonstration that there is a like difference in the cost of providing benefits *for the respective classes.*

435 U.S. at 716 (emphasis added). Los Angeles suggested that eliminating this "equal actuarial value" would result in unfair "subsidization" of women's pensions by men:

> . . . unless women as a class are assessed an extra charge, they will be subsidized, to some extent, by

> the class of male employees. It follows, according to the Department, that fairness to its class of male employees justifies the extra assessment against all of its female employees.

Id. at 708-09 (footnote omitted). But *Manhart* rejected these claims based on reasoning which is fully applicable to the case at bar:

> But the question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful. *Actuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex.* But a statute that was designed to make race irrelevant in the employment market . . . could not reasonably be construed to permit a take-home-pay differential based on a racial classification.

Id. at 709 (emphasis added and citation and footnotes omitted).

Manhart's rejection of an "equal actuarial value" claim was reinforced last Term by this Court's decision in *Connecticut v. Teal*, —— U.S. ——, 73 L. Ed. 2d 130 (1982), which made clear that fairness to a class of persons defined according to race, sex or national origin characteristics cannot justify unfairness to an individual within such a group. There, Connecticut sought to avoid judicial scrutiny for job-relatedness of a written test by pointing to the "bottom line" results of its promotion practices, even though the examination barred many more minority than non-minority applicants from further consideration for promotion. Here, Arizona and its *amici* suggest that lower monthly pension benefits for women should be insulated from judicial scrutiny because the present actuarial value of the annuity option to incumbent female employees is the same as the present actuarial value of the option to incumbent males. The argument is

nothing more nor less than an appeal to the "bottom line" concept rejected by the Court in *Teal*.[1]

2. *Adverse Selection.*

The *amici* in support of petitioners have based much of their concern over this case on the possibility that men would disproportionately elect to take a lump-sum option, rather than a unisex life annuity option that paid them less than their lump sum could command on the open market by purchasing a male life annuity with the lump sum proceeds. The consequence of this anticipated phenomenon, say petitioners' *amici*, would be the withdrawal of men from payroll-deduction life annuity plans and the destruction of the retirement life annuity market as it now exists. If this spectre is laid to rest, much of the force of the arguments made by those *amici* disappears; indeed, the brief of the American Academy of Actuaries ("Academy") admits this expressly at p. 11.

There are two important points to be made about these arguments. First, the parade of horribles leading from "adverse selection" to destruction of the life annuity market is just as much hypothetical and unproven on this record as it was when the same consequences were predicted in *Manhart*. Second, there are available judicially noticeable facts which suggest how highly unlikely it is that these consequences will flow from an affirmance of the judgment below.

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[1] In fact, the situation in *Teal* could be expressed in actuarial terms. Under the facts of that case, black applicants for promotion to the positions at issue had at least as good a chance of ultimate selection as white applicants. If an actuary were to calculate the average chances of selection for each race, one could then speak of the "actuarial value" or "present value" of each black applicant's chance of selection as being the equivalent of the "actuarial value" or "present value" of each white applicant's chance of selection. Focusing on their chances at the outset of the promotion process would produce precisely the analysis which is urged with respect to the case at bar by the American Council of Life Insurance ("Council"). Council brief at pp. 8; 12-14.

In *Manhart*, some of the same *amici* predicted widespread "adverse selection" by males out of the pension plan in question if women employees made equal contributions. 435 U.S. at 716 n.30. But, this Court noted, "there ha[d] been no showing that sex distinctions [in contributions] are reasonably necessary to the normal operation of the Department's retirement plan [to avoid these consequences]." *Id.* Similarly, there is no evidence on this record concerning the extent to which any adverse selection by men would be reasonably likely to occur if Arizona chooses to contract for life annuities offering equal monthly benefits, and requiring equal monthly contributions, for men and women. The briefs of petitioners' *amici* do not contain very much specific data.[2] Hence, *Manhart* is controlling and requires rejection of the claim that fear of adverse selection justifies the discriminatory pay-out to women.

Moreover, it seems self-evident from materials available to the Court and subject to judicial notice that a male employee would have to be extremely foolish to decide to spend more in taxes to get his lump-sum payment and an individual male life annuity than he would gain in the size of his annuity payments.

For the sake of simplicity, let us hypothesize John Doe, an unmarried male retiree with an adjusted age of 65 at the time of retirement. John Doe has $10,000 in taxable income the year of his retirement, in addition to his deferred compensation benefits in whatever form he decides to take them. He has seen the State's description of how the plan works, Exhibit 10, p. 5, to the Joint Stipulated Statement of Facts, and has decided to follow the

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[2] The fact that Arizona decided to stop offering life annuities to its employees after the decision below, Pet.Br. at 7, is not probative of the effect an affirmance of the Ninth Circuit would have on other employers. "Such actions in the face of litigation are equivocal in purpose, motive and permanence." *Jenkins v. United Gas Corporation*, 400 F.2d 28, 33 (5th Cir., 1968) (footnote omitted).

example there stated, of deferring $1,200 in earnings a year for 30 years, invested at a 10% growth rate. He has $200,897 available at retirement. (*Id.*).

If he takes a life annuity with the Lincoln National Life Insurance Company, Exhibit 3, second p. 6, to the Joint Stipulation tells him that he would get a life annuity of $7.02 per month for each $1,000 he invests based on the sexually disparate male table.[3] A unisex value would be somewhere between the male monthly payment of $7.02 and the female monthly payment of $6.18 for each $1,000 invested, a maximum difference of 84 cents. Use of a unisex table could not possibly produce a monthly payment less than $1,241.54.[4]

If John Doe were to take his $200,897 as a lump sum, pay taxes on it and invest the remainder in an annuity at the male rate of $7.02 for each thousand dollars invested, he would do significantly worse. At the 1982 tax rates set forth in 26 U.S.C.A. § 1(c)(1) (Supp. 1982), the incremental tax on John Doe's lump-sum payment would be $95,534,[5] leaving only $105,363 available for the purchase of an annuity at male rates on the open market. At the $7.02 rate this would buy a male life annuity with a monthly benefit of $739.65.[6]

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[3] This figure is for a straight life annuity, with no number of months' payments guaranteed, for the sake of simplicity.

[4] The product of $6.18 and 200.897 thousand-dollar units is $1,241.54.

[5] Federal income tax on a taxable income of $10,000 would be $1,233 with a marginal rate of 19%. Federal income tax on a taxable income of $210,897 would be $96,767 with a marginal rate of 50%. Subtracting one figure from the other produces the fact that the tax on the lump-sum payment would be $95,534. This does not take the possibility of income averaging into account, nor does it take the effect of State taxes into account. See note 7 *infra*.

[6] The product of $7.02 and 105.363 thousand-dollar units is $739.65.

In table form, John Doe's choices are as follows:

Maximum possible loss from a unisex table, if adverse selection by males is 100% and unisex rates are the same as current rates for women (84¢ per thousand dollars invested, with an investment of $200,897)	$168.75/month less than a male table would produce [7]
Cost of taking his lump-sum payment, paying his taxes, and buying a male annuity on the open market ($1,241.54/month less $739.65 a month)	$501.89/month less than a unisex table would produce

Adverse selection by male retirees is extremely unlikely under these facts. While the tax costs of taking the lump sum will vary from individual to individual, they will clearly be substantial. Because adverse selection is unlikely, the unisex rates are likely to be substantially more favorable than the present rates for women, and the $168.75 figure in the above table would likely be considerably smaller.

Finally, any contention that males would take annuities for fixed periods of years because they are aware of their shorter life spans, and thus that a significant danger of adverse selection remains even though the lump-sum option is ruled out as a practical source of adverse selection, would require very specific factual showings, based on the experience of insurers, which are completely absent from this record. The contention assumes that most men are

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[7] If income averaging were taken into account, assuming $15,000 in taxable income in each of the previous four years, our rough calculation is that the additional Federal income tax on the lump sum would still exceed $80,000. A tax cost of $80,000 would leave John Doe with $120,897 to invest at the male rate of $7.02 per thousand dollars invested. His monthly payment would be $848.70, a figure which is $392.84 a month *less* than he would get from use of the unisex table.

willing to bet that they will die early; this flies in the face of common understanding, just as it ignores the potentially strong influence of the fear of outliving one's resources. The absence of record evidence, tested by cross-examination, on such a doubtful contention underscores the problems with the threadbare record on the defenses asserted in this case.

3. *The Accuracy of the Sexually Disparate Tables in Measuring Longevity.*

Closely related to the "actuarial value" argument is the claim, made here and in *Manhart*, that because single-sex mortality tables reflect real differences in longevity between women and men, as a group, unequal life annuity monthly benefits based upon such tables do not amount to differences in compensation based on sex. *Manhart*, of course, flatly rejected this contention:

> The Department's argument is specious because its contribution schedule distinguished only imperfectly between long-lived and short-lived employees, while distinguishing precisely between male and female employees. In contrast, an entirely gender-neutral system of contributions and benefits would result in differing retirement benefits precisely "based on" longevity, for retirees with long lives would always receive more money than comparable employees with short lives. Such a plan would also distinguish in a crude way between male and female pensioners, because of the difference in their average life spans. It is this sort of disparity—and not an explicitly gender-based differential—that the Equal Pay Act intended to authorize.

435 U.S. at 713 n.24.

Even if it were lawful to treat women as a class rather than individually, any employer seeking to justify the use of sexually disparate annuity benefits on the basis of greater longevity for women as a class than for men as a class would still have the burden of proving that its particular sexual disparities were in fact an accurate reflec-

tion of such greater longevity for women as a class. Otherwise, as the National Association of Insurance Commissioners points out, an inaccurate set-back figure would enable insurance companies to earn profits from unfair discrimination. Insurance Commissioners' brief at 25.[8]

The briefs filed by various *amici* in support of petitioners carry the implication that the sexually disparate mortality tables used by the insurance industry are based on scientific measurements. From the information before this Court, and from Census Bureau information which can properly be the subject of judicial notice, such an implication would not be correct.

None of the mortality tables used for life annuity benefits under the Arizona plan contains any separate figures for female mortality. See the exhibits to the Joint Stipulated Statement of Facts.[9] All of them use male mortality figures, and set women back a number of years which appears to be arbitrary. Thus, a male will receive annuity benefits based on his actual adjusted age at retirement, but a woman will receive annuity benefits based on a male's benefits as if the male had retired at an age a constant number of years younger than the woman's actual adjusted age. "Thus a 65 year old woman is treated as being 59 years old and her monthly annuity based on that age, while a 65 year old male has his monthly annuity based on age 65." JA 12. In the insurance industry generally, the amount of the setback varies from plan to plan, and is commonly greater for annuities

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[8] While the Council argues that respondents never challenged the accuracy of the tables used, Council brief at 12 n.2, Arizona was the party attempting to justify an explicit sexual classification and it therefore had the burden of proving the accuracy of the tables used in its plan.

[9] The stipulation describes the Lincoln National LIC plan as containing a separate table for women, JA 12, but exhibit 3 uses only a male table with a setback for women. Perhaps there was an earlier Lincoln National LIC plan.

(where the setback harms women) than for life insurance (where the setback helps women). The following table shows the differences in this supposedly "scientific" assessment of mortality:

Plan	Amount of Setback for Women on Male Mortality Tables	Source of Information
Usual annuity plan (setback harms women by giving them lower monthly benefits)	6 years	*Amicus* brief of National Ass'n of Insurance Commissioners at 25
National Investor	6 years	JA 12
National Investors LIC (presumably a different policy than the one described in the stipulation)	5 years	Exhibit 4, at the pages marked GA-AA in the lower right corner
ITT LIC	5 years	Exhibit 7, p. 8
Hartford Variable Annuity LIC	4 years	Exhibit 6R, p. 10
Lincoln National LIC	4 years	Exhibit 3, second p. 6
Variable Annuity LIC	4 years	Exhibit 5, p. 5
Usual life insurance plans (setback favors women by charging them lower rates)[10]	3 years	*Amicus* brief of National Ass'n of Insurance Commissioners at 25.

To make matters worse, the U.S. Census Bureau's tables for "Expectation of Life at Single Years of Age"

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[10] The fact that life insurance has only a three-year setback for women while annuities commonly utilize a much larger setback is of particular interest, because life insurance is commonly purchased during the earlier periods of life when the male/female differences in life expectancy are greater, and annuities are commonly purchased during the later periods of life when the male/female differences in life expectancy are smallest. (See the table below). Under a nondiscriminatory system, one would expect to see a larger life insurance setback resulting in lower premiums for women, and a smaller annuity setback resulting in lesser reductions in monthly benefits: in short, one would expect to see the reverse of the present system.

make clear that female mortality cannot be set accurately at a constant number of years below male mortality. Sexual differences in longevity decrease substantially over time, and using an average difference in longevity which is accurate for one age will greatly overstate the average differences in longevity at a later age. The following table shows the differences in longevity at various ages for men as a class, compared with women as a class, for 1973 (close to Arizona's adoption of its plan) and for 1978 (the most recent table published): [11]

	Sexual Differences in Life Expectancy at the Ages Stated (Female Life Expectancy Minus Male Life Expectancy)	
Years of Age	1973 Data	1978 Data
25	6.9 years	7.0 years
30	6.6 years	6.6 years
35	6.4 years	6.5 years
40	6.2 years	6.3 years
45	6.0 years	6.1 years
50	5.7 years	5.9 years
55	5.3 years	5.5 years
60	4.7 years	5.0 years
65	4.1 years	4.4 years
70	3.2 years	3.6 years
75	2.3 years	2.8 years
80	1.5 years	2.0 years
85	1.0 year	1.4 years

In addition to the unfairness to individual women of treating women as a class and comparing them with men as a class, the life annuity tables for which Arizona contracted did not even treat the class of women fairly. Arizona's "actuarial equivalent" argument would not have allowed a starting setback for women at the normal retirement age of 65 greater than 4.1 years as of the time

[11] 1973 data: U.S. Bureau of the Census, *Vital Statistics of the United States, 1973: Volume II-Section 5: Life Tables*, Table 5-3 at p. 5-12 (1975). 1978 data: U.S. Bureau of the Census, *Vital Statistics of the United States, 1978: Volume II-Section 5: Life Tables*, Table 5-3 at p. 5-13 (1980).

it adopted its plan, yet the tables it agreed to use included constant setbacks of 5 years and 6 years. Its argument would require that the tables used recognize the substantial narrowing of the sexual differences in average longevity as retirees become older, by providing only a maximum 3.2-year setback for those surviving to age 70, a 2.3-year setback for those surviving to age 75, etc., or by some other means. Yet the sexually disparate tables for which it bargained use constant setbacks. When Arizona's own argument for class-based comparisons is put side-by-side with its practices, it is clear that Arizona is requiring women as a class to subsidize men as a class.

B. Arizona's pension plan cannot be sustained as being within the "open market" exception of *Manhart*.

The remaining contentions of petitioners and their *amici* seek to justify Arizona's pension plan incorporating sex-based life annuities as simply reflective of what is available on the "open market" and thus within the exception enunciated in this Court's decision in *Manhart*; or in the alternative, as nondiscriminatory because the "open market" does not allow Arizona to purchase unisex life annuities for its employees or because female workers may elect a nondiscriminatory "lump sum" option or annuity option for a fixed term of years. Both of these arguments are legally without merit and, in addition, are based upon erroneous factual assumptions about life annuity policies available on the "open market."

1. *Arizona's Plan Does Not Fit Within the "Open Market" Exception of* Manhart *Because the State Did Far More Than Allow Employees to Purchase Whatever Life Annuity Policies Were Available on the "Open Market".*

At the end of its discussion of the liability question in *Manhart*, this Court limited the reach of its holding by adding:

> Although we conclude that the Department's practice violated Title VII, we do not suggest that the

> statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund. Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market. Nor does it call into question the insurance industry practice of considering the composition of an employer's work force in determining the probable cost of a retirement or death benefit plan.

435 U.S. at 717-18 (footnotes omitted). Petitioners and their *amici* contend that Arizona's plan fits within this "open market" exception to *Manhart*'s interpretation of Title VII, but their argument gives this exception a significance out of all proportion to its function in *Manhart*.

Though self-evident, it bears noting that Arizona did not offer its employees the type of pension arrangement described by the Court in *Manhart*. It did not offer all employees, male and female, only the opportunity to take a lump-sum payout at retirement which the employees would then have to convert to a life annuity on the "open market." Nor did it inform its employees that they could elect payout in the form of whatever life annuity they could contract for on the "open market" at the time they elected to participate in the plan. Instead, the state apparatus affirmatively selected a limited number of life annuity plans—all based on single-sex mortality tables—to make available to its employees. Thus, even if a female employee of the state were able to find an annuity based on a unisex mortality table on the "open market," she is precluded under the Arizona plan from electing that payout option if it is not one of the plans or companies pre-selected by the Governing Committee. The advantages of tax deferral after the age of retirement and of group bargaining power are thus lost to the individual

employee who seeks to avoid the discrimination inherent in sex-based annuity tables.

It is one thing for an employer to institute a retirement savings plan, return accumulated contributions to each employee at retirement, and allow each retiree to do with the savings whatever he or she wishes, without any further contact from the employer. It is quite another thing for the employer to adopt a plan limiting the choices of its employees, and in that process contract for only one type of life annuity with explicitly discriminatory conditions, thus imposing a heavy burden in lost tax deferral or reduced security for any woman desiring to avoid the explicit sexual discrimination. *Manhart*'s immunity for the employer who merely makes available the "open market" to its retirees simply does not cover the conduct at issue here.

Petitioners' related argument that they did not intend to discriminate because the insurance companies with which they contracted, rather than the state, initiated the sexually disparate benefit tables for life annuities, is equally groundless. It is settled law that both parties to a discriminatory contract are liable for any discriminatory provisions which it contains, regardless of who initially sugested the discriminatory provisions.[12]

Petitioners also deny intent on the basis of the decision in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), but that case emphasized the ab-

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[12] The leading case is *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). *See also Williams v. New Orleans Steamship Ass'n*, 673 F.2d 742, 750-51 (5th Cir. 1982); *Williams v. Owens-Illinois*, 665 F.2d 918, 926 (9th Cir., 1982); *Farmer v. ARA Services*, 660 F.2d 1096, 1104 (6th Cir., 1981); *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1014 (2nd Cir., 1980), *cert. den.*, 452 U.S. 940 (1981); *United States v. N.L. Industries*, 479 F.2d 354, 379-80 (8th Cir., 1973); *Rosen v. Public Service Electric and Gas Co.*, 477 F.2d 90, 95 (3rd Cir., 1973), and cases there cited.

sence of an explicit gender-based classification in finding that there was no discriminatory purpose. 442 U.S. at 267-69, 273-74. In the absence of such a classification, it was necessary to look further for evidence of discriminatory intent. The case does not help petitioners, because the discrimination here was explicit.

Finally, petitioners urge that the district court did not find discriminatory purpose. The statement of the district court was that the petitioners' agreement with the insurers "is somewhat less than the purposeful invidious gender-based discrimination necessary for a finding that the compensation plan violates the equal protection clause". Pet. App. A-21. With respect, the district court erred on the applicable standard for determining discriminatory intent. No showing of malevolance—of specific intent to injure the disfavored sex—is required. In *Mississippi University for Women v. Hogan*, —— U.S. ——, 73 L. Ed. 2d 1090, 1098 (1982), this Court held that even a motive to protect women may result in a violation of the equal protection clause. The "recitation of even a benign, compensatory purpose" may not be enough to save a facially discriminatory provision. 73 L. Ed. 2d at 1100, *quoting Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975). Here, the gender classification harms women. Petitioners cannot escape the conclusion that they have intentionally discriminated against women.

2. *Arizona's Plan Does not Reflect the "Open Market," Because the State Could Have Contracted for Unisex Table Life Annuities.*

Apparently recognizing that Arizona's pension scheme does not come within the literal language of the *Manhart* "open market" exception, petitioners and their *amici* nevertheless contend that the plan should be sustained under Title VII because it is the functional equivalent of the exception in assertedly offering employees a fair reflection of what is available on the open market. *See, e.g.*, Petitioners' Brief at pp. 14-15. In essence, petitioners raise an affirmative defense of impossibility, and it was

accordingly their burden to adduce evidence supporting the defense.[13] If that evidence is not contained in this record, then the judgment below must be sustained.

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[13] When any defendant seeks to set up an affirmative defense, it has the burden of persuasion in establishing the facts on which the defense rests. *Vance v. Terrazas*, 444 U.S. 252, 269 n.11 (1980) ("duress is an affirmative defense to be pleaded and proved by the party attempting to rely on it"); *United States v. Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (a party raising the defense of mootness has a "heavy burden of persuasion"); *Guzman v. Pichirilo*, 369 U.S. 698, 700 (1962) (an owner attempting to escape liability for the unseaworthiness of his vessel by showing that he has been relieved of his obligation "has the burden of establishing the facts which give rise to such relief"); *United States v. Poland*, 251 U.S. 221, 227-28 (1920) (status as a bona fide purchaser "is an affirmative defense which he must set up and establish.").

In Title VII cases, the contention that a challenged test or educational requirement is job-related raises an affirmative defense, and the employer then has the burden of persuasion in proving the validity of the practice. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425-36 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-36 (1971). An employer with a facially sexually discriminatory policy of refusing to employ women in particular positions has the burden of proving a bona fide occupational qualification. *E.g.*, *Hardin v. Stynchcomb*, 691 F.2d 1364, 1370-72 (11th Cir. 1982), and cases there cited.

It is clear that the burden in question is a burden of persuasion and not merely the burden of production or of articulation discussed in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In *Griggs*, the employer rested on testimony articulating the company's judgment that the challenged requirements would generally improve the overall quality of the work force. This Court rejected the articulation as insufficient and held that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. at 431-32. Similarly, the degree of the factual detail *Albemarle* held employers must show in order to establish validity is inconsistent with a mere requirement of production or of articulation. 422 U.S. at 431-36. In *Connecticut v. Teal*, 73 L.Ed. 2d at 140, this Court stated that respondents' rights were violated by the challenged test "unless petitioners can *demonstrate* that the examination given was not an artificial, arbitrary, or unnecessary barrier" by proving it was valid. (Emphasis supplied).

The affirmative defense of impossibility raised by Arizona requires at a minimum three factual showings: (1) that no companies offered unisex life annuity benefits, (2) if so, that Arizona's bargaining power would not have been sufficient to induce companies not then offering such benefits to agree to provide them to Arizona, and (3) if so, that there would have been no other means by which Arizona could have offered life annuities to its employees on the basis of equal monthly payments for men and women of the same age.

Arizona's sole factual support for its impossibility contention rests on a strained reading of the parties' agreed factual statement.[14] After a detailed discussion of the specific named companies Arizona had selected for inclusion in its plan, JA 7, after a discussion of the additional named companies added to the plan or dropped from it, JA 8-9, after a description of the exhibits to the agreed statement containing the specific provisions offered by these named companies (*Id.*), and after a generalized description of the life annuities offered by the named companies participating in the plan, there is a paragraph containing the isolated sentence on which Arizona pins all its hopes. JA 10. This paragraph begins by referring to the "mortality tables which are published in the contract with the particular company", and continues in pertinent part:

> . . . The amounts received are determined by the use of actuarial tables published by the particular company. All tables presently in use provide a

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[14] In their Reply in support of their petition for certiorari, petitioners sought to draw comfort from the statement in the district court by an attorney for respondents that he did not know whether there were companies in Arizona prepared to offer plans based on unisex tables. Reply at 2. Petitioners have wisely chosen not to rely on this statement in their brief on the merits; a confession of this lack of knowledge by plaintiffs' counsel does come close to satisfying the defendant's burden of proving impossibility.

> larger sum to a male than to a female of equal age, account value and any guaranteed payment period.
> . . .

JA 10. Arizona stresses the second sentence in the above quotation, insisting that it refers to all life annuity tables in existence, not merely to the tables in the plans it approved.[15]. Respondents disagree.[16]

Seen in context, the normal and natural meaning of the stipulation is only that the tables used in the plans approved by petitioners are sexually disparate. *Cf. Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925) ("the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."), *quoted in Chandler v. Roudebush*, 425 U.S. 840, 848 (1976).

The *amicus* brief of the American Council of Life Insurance ("Council") states at 10 and 24 that the Council "is not aware of any private insurance company which offers an annuity plan which does not calculate benefits according to sex-specific mortality tables." Arizona's reply in support of its petition for certiorari—but not its brief on the merits—relies on a similar statement by the Council in its *amicus* brief to the Ninth Circuit to support its defense of impossibility. Putting aside the serious question whether an affirmative defense can ever be established in the absence of any facts of record whatsoever, simply on the basis of a statement in an *amicus* brief, the Council's statement is insufficient to establish even the first of the three showings Arizona would logically have to make in order to sustain its impossibility defense. *First*, if the Council's statement means that it

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[15] As if hopeful that mere repetition would make the assertion stick, Arizona has repeated this representation in its Brief at 3, 5, 9, 11, 14, 15, 17, 20, 26, and 27.

[16] See respondents' Opposition to the petition for certiorari at 1.

is unaware of any insurance companies willing to provide employers with group life annuity plans based on unisex tables, its knowledge is demonstrably incomplete. The Lincoln National Life Insurance Company—one of the companies used by Arizona in its plan—has informed *amici* in response to a telephone call that, if the potential customer's business is large enough, it is willing to provide group life annuities providing the same monthly annuity payments to men and women of the same age who have invested the same amounts. It does this on the basis of unisex tables which take into account the ratio of male employees to female employees.[17] Moreover, the Minnesota Mutual Life Insurance Company and the Northwestern National Life Insurance Company provide group life annuities to faculty members of the University of Minnesota, based on unisex tables providing equal monthly benefits for men and women of the same age who invest the same amounts.[18] Arizona's plan allowed for the use of out-of-State insurance companies,[19] and there is no rea-

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[17] See the affidavit of Richard T. Seymour, lodged with the Clerk. See n. 20, *infra*.

[18] *The Chronicle of Higher Education*, Vol. 25, No. 7, October 13, 1982, at 25-26.

[19] Rule R2-9-07(A) of the Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, Exhibit 1 to the Joint Stipulated Statement of Facts, imposes no geographic limitations on the insurance companies offering annuities under the plan. By contrast, part (B) of that rule limits the banks, savings and loan associations and credit unions offering savings accounts under the plan to those having their principal offices in Arizona. Licenses to do business within a State are, of course, necessary, but these are not difficult to obtain. In point of fact, all of the insurance companies offering life annuities under the plan have their corporate headquarters outside of Arizona. Lincoln National LIC's home office is in Fort Wayne, Indiana (Exhibit 3); National Investors LIC's home office is in Little Rock, Arkansas (Exhibit 4); Variable Annuity LIC's home office is in Houston, Texas (Exhibit 5); Hartford Variable Annuity LIC is a South Carolina company with

son to suppose that Arizona could not have obtained similar annuities either from Lincoln National or from the companies doing business with the University of Minnesota. *Second*, if the Council's statement be taken to mean only that sex-specific mortality tables would have to be considered in setting up the overall level of benefits under a unisex table,[20] this would still not offer a legal defense for Arizona's explicit agreement for lesser monthly benefits to women.

Neither Arizona nor the *amici* which have filed briefs in its support have addressed the other facts essential to a showing of impossibility. The Council emphasizes that the market power of Arizona and of other employers enables them to bargain for—and to obtain—annuity benefits substantially better than those available to individuals. Brief at 24. No reason appears why Arizona could not have bargained for, and obtained, tailor-made life annuity plans which offered equal monthly payments to men and women. Arizona has not even tried to show that it raised the question in its bargaining.

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executive offices at Hartford, Connecticut (Exhibit 6R); and ITT Life Insurance Corporation's home office is in Thorp, Wisconsin (Exhibit 7).

[20] *Manhart* recognized this possibility, 435 U.S. at 718. The Council recognizes this possibility although it is worried by the problem of possible fluctuation in workforce composition, Brief at 21-22. The American Academy of Actuaries ("Academy") by contrast, urges that provision of equal monthly life annuity payments would cause little difficulty or expense in the larger defined benefit plans, even asserting that the "normal" monthly pension benefit is already equal for similarly situated men and women. Brief at 19-20, 22-23. Its concern is with smaller defined benefit plans, but no reasons appear in its brief why smaller employers could not be combined into larger groups for purposes of risk-pooling, as is done with health insurance. Moreover, the larger the plan, the less risk of sharp fluctuations in male/female ratios. Council Brief at 21 n.12. The Academy seems to state that an affirmance of the Ninth Circuit would cause little problem for defined-contribution plans, except for the problem of adverse selection. Brief at 16-18.

Nor has Arizona shown that it had no choice but to use existing insurance companies to provide annuities. Other devices, such as the establishment of a State governmental corporation to sell annuities and make monthly benefits, may have been feasible. Arizona has simply not met its burden.[21]

Petitioners are also precluded, as a matter of law, from seeking to justify the inclusion of the discriminatory life annuity option in their plan on the basis of the "lump sum" payout option available to women enrolled in the plan. From the above discussion, it is clear that the lump-sum option imposes a heavy price on its exercise. The option of an annuity for a fixed period of years should be even less attractive for women than for men. Neither of these payout alternatives constitutes a nondiscriminatory option available to women which can sustain Arizona's pension plan.

Just last Term, this Court held that a male was sufficiently disadvantaged by a rule barring men from a State-supported nursing school in his hometown to be able to mount a challenge to the rule under the Equal Protection Clause. He had the "nondiscriminatory option" of attending a different State-supported nursing school in a different area, but would be disadvantaged by the inconvenience of having to drive "a considerable distance" from his home and by being deprived of credit for additional training working while attending school. *Mississippi University for Women v. Hogan*, 73 L. Ed. 2d at 1098 n.8. The so-called "nondiscriminatory option" here

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[21] As to the claims of "revolution", the brief of the American Academy of Actuaries—which takes no position on the ultimate issue herein—makes clear that the insurance and pension industries can accommodate an affirmance of the Ninth Circuit, as long as the decisions of the courts take into account the effects of differences in various types of pension and annuity benefits. This can best be done on a case-by-case basis, inasmuch as variations among plans seem to be legion.

would involve far greater cost or, in the case of fixed-term annuities, far less security, than the challenged option. The disadvantages here are much more substantial than those found sufficient for the challenge in *Hogan*.

II. BECAUSE *MANHART* GAVE EMPLOYERS ADEQUATE WARNING OF THE TITLE VII REQUIREMENTS FOR PENSION PLANS, THE AWARD OF MONETARY RELIEF BELOW WAS JUST AND PROPER.

It seems evident that an intentional discriminator has no good objection to the entry of a back pay award against it. While Arizona argues that one of the purposes of the program was to take advantage of tax incentives while avoiding any non-administrative expense to the State, the way to achieve that goal was to have avoided unlawful discrimination.[22]

Arizona's objection to a back pay award is further undermined by its having ignored the extraordinary "grace period" this Court allowed employers with discriminatory pension schemes in *Manhart*. The Court stated that there was no reason to believe that employers would have failed to abide by Title VII if they had understood the law's application to pension systems, and added:

> There is no reason to believe that the threat of a backpay award is needed to cause other administrators to amend their practices to conform to this decision.

435 U.S. at 720-21. If Arizona had heeded the necessary application of the *Manhart* decision to discriminatory

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[22] The expense of a monetary recovery will in any event be light; the plan is a relatively new one and only four women selecting the life annuity option had retired as of the time of the stipulation. JA 6.

benefits and had cleared up its problem within a reasonable time after announcement of the decision, it would clearly have been entitled to a clean slate in terms of monetary relief.

Like most other employers, however, Arizona decided to ignore this Court's offer of a grace period and to fight every step of the way against conforming its policies to the requirements of Title VII.[23] The certain prospect of back pay relief is as essential to obtain compliance in the area of annuity benefits as it is in other areas of employment.

Manhart's denial of back pay was based on a premise shown by experience to have been faulty. To allow another grace period would reward intransigence and diminish respect for the law's demands. To give recalcitrant employers such as Arizona even the benefit of a grace period to the date of the *Manhart* decision would give to employers who have proven their recalcitrance a benefit based on an assumption of good faith. This would effectively postpone the effective date of Title VII to the date of the *Manhart* decision and frustrate the purposes of Title VII.

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[23] Despite the 1978 decision of this Court in *Manhart*, and despite the 1981 decision of the Southern District of New York that such practices are illegal, for example, the City of New York still deducts a higher percentage of its female employees' pay than of similarly situated male employees' pay for its retirement plan, and still provides lower monthly retirement allowances to female retirees than to similarly situated male retirees over the course of their lives. See *Women in City Government United v. City of New York*, 515 F.Supp. 295 (S.D.N.Y. 1981).

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

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